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MAYBANK ISLAMIC BHD v. M-IO BUILDERS SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
B HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: W-02(MUA)(W)-1595-09-2014]
17 MAY 2016

C ***BANKING:*** *Banks and banking business – Islamic banking – Murabahah overdraft facility ('MOD facility') – Purchase and resale of same assets – Whether agreement complied with murabahah concept of financing – Whether purchase and resale of same assets prohibited under Syariah principal of financing – Whether facility null and void – Whether claim for ta'widh justified*

D By a letter of offer ('first LO'), the appellant granted the first respondent, *inter alia*, a *murabahah* overdraft facility ('MOD facility') for RM3 million. The facility was secured by legal charges over landed assets and two letters of guarantee by the second respondent. The parties executed a master facility agreement, an asset purchase agreement ('APA') and an asset sale agreement ('ASA') dated 15 December 2003. Under the APA and ASA, the appellant E purchased the 'rights, title, interest and benefit of the customer as derived from project 1 and project 2'. The MOD facility was later restructured to RM5 million *vide* a letter of offer ('second LO'). It was also a term, *inter alia*, in the second LO that the MOD facility was to be settled in one lump sum payment within the agreed 12 months financing period and that the MOD F facility could only be utilised subject to a new APA and ASA. The restructuring of the MOD facility was executed *vide* a facility agreement and a new APA and ASA dated 23 December 2004. The subject of sale under the new APA and ASA were four parcels of land. The respondents failed to settle the outstanding amount due under the MOD facility. Therefore, the G appellant upon terminating the MOD facility, proceeded to claim for the outstanding amount under the MOD facility. The respondents counterclaimed against the appellant seeking, amongst others, damages for an alleged wrongful and unilateral reduction of the MOD facility. Before the filing of the present action, the first respondent commenced another action against the appellant together with Malayan Banking Berhad. A consent order was H entered in that suit whereby the first respondent admitted its liability to pay the appellant under the MOD facility but disputed the quantum. The High Court Judge in the present action ('HCJ') dismissed the appellant's claim on the grounds that the: (i) agreement relating to the MOD facility was unlawful for failure to comply with the requirement of Syariah under the guidelines I issued by Bank Negara Malaysia titled '2013 *Murabahah* Guidelines' ('guidelines') as there was no fresh ASA and APA executed for the MOD facility as the assets used in respect of the MOD facility under the second

LO was the same asset as the ASA and APA of the MOD facility under the first LO; and
(ii) appellant had no right and no basis to charge *ta'widh*. Hence, the present appeal.

Held (allowing appeal; dismissing cross-appeal)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) The assets involved under the ASA and the APA executed for the purpose of the first LO and the asset under the second ASA and APA for the purpose of the second LO were different. The underlying assets for the APA and the ASA dated 15 December 2003 were the 'rights, title, interest and benefit of the customer as derived from project 1 and project 2'; whereas the underlying assets for the APA and ASA dated 23 December 2004 under the second LO were four parcels of lands. This fact was not given due consideration by the trial judge. However, since the transaction of the MOD facility was premised on a specie of *murabahah* contract known as *bai' al-inah*, the same assets can be sold and purchased multiple times and are acceptable in Syariah. Therefore, the HCJ had erred in holding that the transaction of the MOD facility was null and void premised on the sale and purchase of the same asset. (paras 25 & 26)

(2) The MOD facility was correctly terminated because the respondents did not adhere to the terms that it should be fully paid by the respondents on 5 May 2006 as there was no new APA and ASA executed. In the circumstances, the appellant should be allowed to exercise its rights as conferred under all the relevant LOs and security documents to charge *ta'widh*. Further, the appellant had reserved its right to claim for *ta'widh* in the event of a default. (paras 33 & 34)

(3) The terms of the agreements and the guidelines entitled the appellant to claim for compensation and *ta'widh* for the default payment on the facility by the first respondent. The appellant had shown to the court its statement of account which detailed the calculation and the respondents had not challenged the method of the calculation by the appellant or had failed to show how the appellant's calculation was wrong. Thus, the calculation by the appellant should have been accepted by the HCJ. (para 38)

(4) A consent order is like a judgment of the court and would remain valid until set aside. It was plain and obvious that from the clause of the consent order, the first respondent had admitted to the appellant on the MOD facility. Therefore, the respondent would be estopped from raising any further issue on the MOD facility except on the quantum *per se* as reflected in the consent order. On this ground alone, the liability of the first respondent is founded. (para 45)

(5) The first respondent had agreed that the appellant would have absolute discretion to review and vary the terms of the facility granted to the first respondent. Furthermore, the review of the facilities and the variation of the terms was communicated to the respondents by a fresh letter of offer. The first respondent was at liberty to either agree to the revised terms or to reject them. Therefore, the MOD facility was correctly terminated and the respondents' counterclaim was wholly unsubstantiated. (paras 46 & 47)

Per Hamid Sultan Abu Backer JCA (concurring):

(1) The HCJ's assessment of the Syariah principles without first referring to the Shariah Advisory Council ('SAC') impinges on the decision of the HCJ. In addition, the documents and evidence submitted by the plaintiff sufficiently proved a *prima facie* case against the respondents both on liability and quantum and had not been rebutted according to the law. On the issue of *ta'widh*, the sum of about RM2 million was not only unjust and inequitable but oppressive and it was a matter for the regulatory authority like Bank Negara to investigate such abuse. However, because the pleaded case of the respondents and the supporting evidence was not well articulated, the appellate court, based on the pleadings rules would not be able to reduce the quantum claimed for and/or order proper assessment of damages. (para 68)

***Bahasa Malaysia** Headnotes*

Melalui satu surat tawaran ('tawaran pertama'), perayu memberi responden pertama, antara lain, satu kemudahan overdraf *murabahah* ('kemudahan MOD') untuk RM3 juta. Kemudahan ini dijamin oleh pajakan ke atas aset tanah dan dua surat jaminan oleh responden kedua. Pihak-pihak melaksanakan satu perjanjian kemudahan induk, perjanjian pembelian aset ('APA') dan perjanjian penjualan aset ('ASA') bertarikh 15 Disember 2003. Di bawah APA dan ASA, perayu membeli 'hak-hak, hak milik, kepentingan dan manfaat pelanggan yang diperolehi dari projek 1 dan projek 2'. Kemudahan MOD kemudiannya distrukturkan semula kepada RM5 juta melalui surat tawaran ('tawaran kedua'). Adalah juga satu terma, antara lain, dalam tawaran kedua bahawa kemudahan MOD tersebut akan diselesaikan dalam satu bayaran sekali gus dalam tempoh pembiayaan 12 bulan seperti dipersetujui dan kemudahan MOD tersebut hanya boleh digunakan tertakluk kepada APA dan ASA yang baru. Penstrukturan semula kemudahan MOD dilaksanakan melalui satu perjanjian kemudahan dan APA dan ASA baru bertarikh 23 Disember 2004. Subjek jualan di bawah APA dan ASA yang baru adalah empat bidang tanah. Responden gagal menjelaskan jumlah tertunggak yang perlu dibayar di bawah kemudahan MOD. Oleh itu, perayu setelah menamatkan kemudahan MOD, menuntut jumlah yang tertunggak di bawah kemudahan MOD. Responden membuat tuntutan balas terhadap perayu dan memohon, antara lain, ganti rugi bagi pengurangan secara salah dan unilateral kemudahan MOD. Sebelum memfailkan tindakan ini,

responden pertama telah memulakan satu lagi tindakan terhadap perayu bersama-sama dengan Malayan Banking Berhad. Satu perintah persetujuan dibuat dalam tindakan tersebut yang mana responden pertama mengakui liabiliti untuk membayar perayu di bawah kemudahan MOD tetapi mempertikaikan kuantum. Hakim Mahkamah Tinggi ('HMT') dalam tindakan ini menolak tuntutan perayu atas alasan bahawa (i) perjanjian berkaitan dengan kemudahan MOD adalah tidak sah kerana tidak mematuhi kehendak Syariah seperti yang diperuntukkan di bawah garis panduan yang dikeluarkan oleh Bank Negara Malaysia bertajuk '2013 *Murabahah* Guidelines' ('panduan') kerana tidak ada ASA dan APA baru dilaksanakan untuk kemudahan MOD kerana aset yang digunakan dalam kemudahan MOD di bawah tawaran kedua adalah aset yang sama dengan ASA dan APA dalam MOD kemudahan di bawah tawaran pertama; dan (ii) perayu tidak mempunyai hak dan tidak ada asas untuk mengenakan *ta'widh* terhadap responden-responden. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan; menolak rayuan balas)
Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Aset yang terlibat di bawah ASA dan APA yang dilaksanakan untuk tujuan tawaran pertama dan aset di bawah ASA dan APA kedua untuk tujuan tawaran kedua adalah berbeza. Aset untuk APA dan ASA bertarikh 15 Disember 2003 adalah 'hak-hak, hak milik, kepentingan dan manfaat pelanggan sebagai diperolehi dari projek 1 dan projek 2'; manakala aset untuk APA dan ASA bertarikh 23 Disember 2004 di bawah tawaran kedua adalah empat bidang tanah. Fakta ini tidak diberi perhatian yang sewajarnya oleh hakim bicara. Walau bagaimanapun, oleh kerana transaksi kemudahan MOD adalah berdasarkan kontrak *murabahah* yang dikenali sebagai *bai' al-inah*, aset yang sama boleh dijual dan dibeli beberapa kali dan diterima dalam Syariah. Oleh itu, HMT terkhilaf dalam memutuskan bahawa transaksi kemudahan MOD adalah tidak sah dan terbatal berasaskan penjualan dan pembelian aset yang sama.

(2) Kemudahan MOD telah ditamatkan dengan betul kerana responden tidak mematuhi syarat-syarat bahawa ia perlu dibayar sepenuhnya oleh responden pada 5 Mei 2006 kerana tidak ada APA dan ASA baru yang dilaksanakan. Dalam keadaan ini, perayu harus dibenarkan untuk melaksanakan haknya seperti yang tertakluk di bawah semua tawaran berkaitan dan dokumen sekuriti untuk mengenakan *ta'widh*. Juga, perayu telah menjaminkan haknya untuk menuntut *ta'widh* sekiranya terdapat keingkaran membayar semula pinjaman.

(3) Terma-terma perjanjian dan panduan memberikan hak kepada perayu untuk menuntut pampasan dan *ta'widh* bagi keingkaran membayar semula pinjaman kemudahan oleh responden pertama. Perayu telah menunjukkan kepada mahkamah penyataan akaun yang memperincikan

A pengiraan dan responden tidak mencabar kaedah pengiraan oleh perayu atau gagal menunjukkan bagaimana pengiraan perayu adalah salah. Oleh itu, pengiraan perayu harus diterima oleh HMT.

(4) Sesuatu penghakiman persetujuan adalah seperti penghakiman mahkamah dan akan kekal sah sehingga diketepikan. Adalah nyata dan B jelas bahawa dari klausa perintah persetujuan, responden pertama telah mengaku kepada perayu berdasarkan kemudahan MOD. Oleh itu, responden akan diestop daripada membangkitkan sebarang isu lanjut mengenai kemudahan MOD kecuali pada kuantum seperti yang tertera pada penghakiman persetujuan. Atas alasan ini sahaja, liabiliti C responden pertama ditubuhkan.

(5) Responden pertama telah bersetuju bahawa perayu akan mempunyai budi bicara mutlak untuk menyemak dan mengubah terma kemudahan yang diberikan kepada responden pertama. Tambahan pula, kajian semula kemudahan dan pengubahan terma-terma telah dimaklumkan D kepada responden-responden dengan surat tawaran yang baru. Responden pertama bebas untuk bersetuju atau menolak terma yang disemak semula. Oleh itu, kemudahan MOD ditamatkan dengan betul dan tuntutan balas responden-responden adalah secara keseluruhannya tidak berasas.

E **Oleh Hamid Sultan Abu Backer HMR (menyetujui):**

(1) Penilaian HMT terhadap prinsip-prinsip Syariah tanpa terlebih dahulu merujuk kepada Majlis Penasihat Syariah ('SAC') memudaratkan keputusan HMT. Tambahan, dokumen-dokumen dan keterangan yang F dikemukakan oleh plaintif membuktikan kes *prima facie* terhadap responden-responden kedua-duanya dalam liabiliti dan kuantum dan tidak disangkal berdasarkan undang-undang. Mengenai isu *ta'widh*, jumlah kira-kira RM2 juta bukan sahaja tidak adil dan tidak saksama tetapi menindas dan ia merupakan perkara untuk pihak berkuasa kawal selia seperti Bank Negara untuk menyiasat perkara tersebut. Walau G bagaimanapun, oleh kerana kes yang diplidkan responden-responden dan keterangan sokongan yang tidak diperjelaskan dengan baik, Mahkamah Rayuan, berdasarkan kaedah-kaedah pliding tidak dapat mengurangkan kuantum yang dituntut dan/atau memerintahkan penilaian ganti rugi yang sewajarnya.

H **Case(s) referred to:**

Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd [2003] 1 CLJ 625 CA ***(refd)***

CIMB Islamic Bank Bhd v. LCL Corporation Bhd & Anor [2011] 7 CLJ 594 HC ***(refd)***

Islamic Investment Company of the Gulf (Bahamas) Ltd v. Symphony Gems NV & Others I *[2002] All ER (D) 171* ***(refd)***

K Umarkandha Rajah v. EL Magness [1984] 2 CLJ 23; [1984] 1 CLJ (Rep) 416 FC ***(refd)***

KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***

Majlis Amanah Rakyat v. Bass Lai [2009] 2 CLJ 433 HC ***(refd)***
Malayan Banking Bhd v. Worthy Builders Sdn Bhd & Ors [2015] 1 LNS 84 CA ***(refd)***
Malayan Banking Bhd v. Ya'kup Oje & Anor [2007] 5 CLJ 311 HC ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***
Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd and Others [2004] 4 All ER 1072 ***(refd)***
Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***
Yong Fuat Meng v. Chin Yoon Kew [2008] 5 CLJ 705 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 25
Evidence Act 1950, s. 73A(1)
Rules of Court 2012, O. 42 r. 12A

Other source(s) referred to:
Critical Thoughts: Legislative Intervention Imperative To Support Islamic Financing On A Global Scale, [2009] 1 MLJ 1xiv
Is There a Need for Legislative Intervention to Strengthen Shariah Banking and Financial Instrument, [2002] 3 MLJ clxx
Islamic Banking Regulatory Authorities in Malaysia: Their Role and Power: A Critical View, [2015] 9 CLJ i

For the appellant - Syed Fadzil Alhabshi, Noraini Yacob & Amirus Anis Dzohry; M/s Sidek Teoh Wong & Dennis
For the respondents - Moh Siew Tong; M/s Ven & Assocs

[Editor's note: For the High Court judgment, please see Maybank Islamic Bhd v. M-IO Builders Sdn Bhd & Anor [2015] 4 CLJ 526 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Rohana Yusuf JCA:

Introduction

[1] The appellant (plaintiff) appealed against the decision of the learned High Court Judge who refused to enter judgment after full trial for a claim of a breach of agreement pursuant to Islamic financial facility granted to the first respondent (first defendant). The second respondent is the guarantor. The respondents' counterclaim was also dismissed. There was also a cross-appeal by the respondents on the dismissal of the counterclaim.

[2] We heard the appeal on 19 May 2015 and we had unanimously allowed the appeal and dismissed the cross-appeal. We set out below the reasons for our decision.

[3] My learned brother, Abdul Aziz bin Abdul Rahim JCA had seen this judgment in draft and had agreed with the same. My learned brother Hamid Sultan bin Abu Backer JCA will be providing a supporting judgment.

Background Facts

[4] The background to this case started, by a letter of offer dated 31 July 2003 (first LO) when the appellant granted the following Islamic banking facilities to the first respondent in a total sum of RM14 million, consisting of:

(i) an Islamic term loan (BBA) for RM2 million;

(ii) *murabahah* overdraft facility (MOD facility) for RM3 million;

(iii) Islamic bank guarantee (BG) for RM4 million; and

(iv) *murabahah* overdraft against progress claim (MOD/PC) for RM5 million.

[5] The facilities were provided based on *murabahah* financing principle. For that purpose, the parties had executed master facility agreement dated 15 December 2003, the asset purchase agreement (APA) and the asset sale agreement (ASA) of even dates. Under the APA and ASA the appellant purchased the "rights, title, interest and benefit of the customer as derived from project 1 and project 2" at appellant's purchase price and sold the same to the first respondent at the appellant's selling price.

[6] The Islamic banking facilities were secured by legal charges over landed assets known as HSD No. 30498 Lot PT 34901, HSD No. 30499 Lot 34902, HSD No. 30500 Lot 34903 and HSD No. 30501 Lot 34904 Mukim Klang Selangor Darul Ehsan and two letters of guarantee by the second respondent.

[7] The respondents had settled all the outstanding due under the facilities, except for the *murabahah* overdraft facility (MOD facility). This is the subject matter of claim by the appellant against the first and second respondents. The claim was for RM4,599,016.37 as at 28 February 2013.

[8] It was the appellant's case that under the terms of the first LO the MOD facility was for RM3 million but was later restructured to RM5 million. The restructuring was made *vide* a letter of offer dated 8 December 2004 (second LO). It was also a term in the second LO that the MOD facility was to be settled in one lump sum payment within the agreed 12 months financing period and subject to yearly review. This MOD facility can only be utilised subject to new APA and ASA.

[9] The restructuring of the MOD facility was executed *vide* facility agreement dated 23 December 2004 and a new APA and ASA each also dated on 23 December 2004. The subject of sale under this APA and ASA was four parcels of land described as HSD No. 30498 Lot PT 34901, HSD No. 30499 Lot 34902, HSD No. 30500 Lot 34903 and HSD No. 30501 Lot 34904.

[10] Subsequently, the MOD facility was reviewed when the third letter of offer (third LO) from the appellant dated 28 May 2009 had reduced the then existing limit of RM4.5 million (after annual reduction) to RM3.5 million. This was protested by the first respondent *via* a letter dated 12 June 2009, counter-proposing its own terms. The appellant on that request of the first respondent issued the fourth letter of offer dated 16 July 2009 (fourth LO) incorporating the counter proposal of the first respondent.

[11] The first respondent however, did not accept this offer despite the fact that it was based on the first respondent's own counter proposal. Instead, the first respondent by a letter dated 21 July 2009 insisted on relying on the terms of the second LO and with no new APA and ASA.

[12] After the letter of 21 July 2009 from the first respondent, there were several correspondences and meetings between the appellant and the first respondent to resolve the outstanding issues regarding the MOD facility. Of relevance to be noted were that, the first respondent had agreed to provide a letter of undertaking to settle all arrears under the term loan facility upon overdraft (restricted) drawdown from Affin Bank Berhad amounting to RM1.3 million and at the same time highlighted to the appellant that the amount outstanding for the MOD facility was incorrect (see p. 851 of the appeal record vol. 4). The first respondent also requested the appellant to revise all the banking facilities as per the first LO (see pp. 423 to 433 of the appeal record vol. 3).

[13] Though the appellant did not accede to the first respondent's request to restore the banking facilities as per the original terms, the appellant in its letter of 10 December 2010, however, agreed to issue a letter of consent or disclaimer for the first respondent's further borrowing with Affin Bank Berhad (see pp. 838 to 839 of the appeal record vol. 4). The appellant had also agreed to exclude their rights and interest under debenture over contract proceeds for the project to be financed by Affin Bank Berhad on condition that:

(i) the respondent provides a letter of undertaking to settle all arrears to date (as at 10 December 2010) for BBA term financing upon contract financing drawdown from Affin Bank Berhad;

(ii) the respondents execute fresh APA and ASA and all other terms stated under the first, third and fourth LOs remained unchanged (see pp. 858 to 859 of the appeal record vol. 4).

[14] It was the appellant's contention that the second LO superseded the first LO. The first respondent, however, insisted that the terms under the first LO be reinstated. From the exchange of correspondences between the parties it would appear that the first respondent also took objection to the appellant imposing *ta'widh* charges under the MOD facility.

[15] The appellant having terminated the MOD facility proceeded to make a claim for the outstanding amount under the MOD facility. The respondents counterclaimed against the appellant seeking for various declaratory orders and damages for an alleged wrongful and unilateral reduction of the MOD facility.

[16] To be noted, however, before the filing of this action by the appellant, the first respondent had already commenced an action against the appellant together with Malayan Banking Berhad under suit No. 22M-2-03-2013. A consent order dated 27 March 2013 was entered in that suit whereby the first respondent admitted its liability to pay the appellant under the MOD facility but disputed the quantum, as well as the payment due date. Following that consent order, the first respondent withdrew the suit with liberty to file afresh.

[17] It was agreed between the parties that the issues under the consent order will be determined under this present suit.

Decision Of The High Court

[18] The learned judge dismissed the appellant's claim on the grounds as summarised in the written submission of counsel of the appellant as follows:

(a) That the *murabahah* Overdraft Facility had violated the *murabahah* concept of financing and therefore null and void and has no effect. Due to the said non-compliance, the said *murabahah* overdraft financing is illegal and so the same cannot be enforced by the court.

(b) That notwithstanding the Consent Order dated 27.03.2013 which had admitted liability of the Respondents, the Court is not estopped from deciding on the issue of liability due to the Facility related to the Consent Order is illegal for non-compliance to Syariah.

(c) That the Appellant/Plaintiff's claim is barred by limitation.

(d) That the Appellant/Plaintiff's claim is with laches and acquiescence.

(e) That the Appellant/Plaintiff had failed to prove its claim for *Ta'widh* as the basis for *Ta'widh* is not present.

(f) That the Appellant/Plaintiff had failed to prove the amount of claim.

[19] The learned judge held that the agreement relating to MOD facility was unlawful for failure to comply with the requirement of Syariah as required under the guidelines issued by Bank Negara Malaysia. The learned judge also held that the appellant had no right and no basis to charge *Ta'widh* after maturity of the *murabahah* overdraft facility which was not extended. The learned judge at para. 106 of her grounds of judgment viewed that:

106. It was apparent from the evidence both testimonial and documentaries, both the contracting parties ignored the features of financing premised on the Islamic Concept termed as *murabahah* and blatantly regarded the transaction as if it was a conventional loan. By their conduct, both parties were privy to the illegality and had camouflaged the MOD Facility as *murabahah* and both had benefited from this illegality. Obviously, this transaction had clearly violated the basic tenets of the financing premised on the Islamic Concept. Further as I had shown above the contract involving the MOD Facility, which the parties termed as *murabahah* was contrary to the basic tenets of financing based on *murabahah* as there were no fresh ASA and APA having been executed. In view of this and as both parties were privy to illegality as illustrated above both parties had not come to this Court with clean hands. The Court therefore would not assist the parties who had come to Court to seek relief, if they had not come with clean hands.

[20] Clearly from the above passage, the findings of non-compliance with the Syariah principles was confined to the fact that; 'there was no fresh ASA and APA executed for the MOD facility' and the assets used in respect of MOD facility dated 23 December 2004 under the second LO was the same asset as the ASA and APA of the MOD facility under the First LO. The said assets, according to the learned judge were already owned by the first respondent. Thus the sale and resale of these assets to the first respondent in order to reschedule the financing under the MOD facility would involve the same asset as the master facility agreement dated 15 December 2003, read together with the first LO. This, Her Ladyship said, is prohibited by Syariah as the same asset cannot be sold and resold.

[21] Accordingly and in essence, it was the learned judge's finding that in defiance of the guidelines, the appellant had used the same underlying assets in the sale and purchase transaction as used for other facilities granted by the appellant. Her Ladyship relied on the Bank Negara Malaysia Guidelines titled "2013 *Murabahah* Guidelines" with reference BNM/RH/STD 028-4 and also a publication by Bank Negara Malaysia titled "The Principle and Practices of Shariah in Islamic Finance – Shariah Parameter Reference 1-Murabahah year 2009". The learned judge found the guidelines applicable in this case and that the principle of *bai' al-inah* was not applicable to the MOD facility.

[22] We agreed with learned appellant's counsel that since both the guidelines and the Syariah Parameters are dated 2009 and the guidelines issued by Bank Negara Malaysia only took effect on 1 April 2014, whereas the MOD facility was granted in 2003, both these documents even if applicable do not apply retrospectively to the transactions (see *Tenaga Nasional Berhad v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749). We agreed that the guidelines in question do not retrospectively apply to the transaction between appellant and respondent.

[23] Nevertheless, we proceeded to examine the purported non-compliance. It was submitted by the appellant that the financing of the MOD facility was based on a specie of *murabahah* concept called *bai' al-inah* which has been defined in Syariah Resolutions Islamic Finance by Bank Negara Malaysia dated October 2010 (2nd edition) (the resolution). It was submitted that based on those definitions the current transaction, is of similar in nature. We have examined the aforesaid resolution and agreed with learned counsel that the nature of transaction of the MOD facility in the instant appeal is a *bai' al-inah* agreement as defined, by the resolution and hence the application of the guidelines stated by the learned judge was misplaced. It was to be noted that the guidelines is specific for *murabahah* contracts and *murabahah* purchase ordered arrangement and not addressing the *bai' al-inah* contract.

[24] On the argument that the same underlying assets were used for both the first and second LOs, the explanation of the appellant was that they were different underlying assets as can be seen from the APA and ASA executed between the parties. It was pointed out to us that the underlying assets for the APA and ASA dated 15 December 2003 were 'the rights, title, interest and benefit of the customer as derived from project 1 and project 2; whereas the underlying assets for the APA and ASA dated 23 December 2004 were 'collectively the four parcels of lands', as we have alluded to earlier.

It was argued that even if the assets used for both the transactions were the same, the same assets can be sold and purchased pursuant to an Islamic facility multiple times without affecting Syariah compliance. This was because a transaction under the first LO was already completed when the parties executed the sale and purchase transaction making that same asset available to be transacted.

[25] We found favour with the contention of learned counsel for the appellant that the assets involved under the ASA and the APA executed for the purpose of the first LO pursuant to the master facility agreement and the asset under the second ASA and APA for the purpose of the second LO were different. The underlying assets for the APA and ASA dated 15 December 2003 were 'the rights, title, interest and benefit of the customer as derived from project 1 and project 2'; whereas the underlying assets for the APA and ASA dated 23 December 2004 under the second LO were the four parcels of lands over which the first respondent had created first and second party legal charge in favour of the appellant. This fact was not given due consideration by the trial judge.

[26] Furthermore, it was apparent from the definition in the resolution that the transaction of the MOD facility is premised on a specie of *murabahah* contract known as *bai' al-inah*. Under the bai' al-inah transaction the same assets can be sold and purchased multiple times and are acceptable in Syariah. Learned counsel for the appellant argued that when the APA and

ASA were executed, the said transaction of buying and selling was completed. Thereafter, when the second APA and ASA were executed another transaction became complete, and what is left after all the transactions were completed was the debt (*Dayn*) created that has to be paid in instalments or according to the contractual terms. Learned counsel further submitted that this issue (of multiple sale and purchase of the same asset) had been referred to the Shariah Advisory Council (SAC) of Bank Negara Malaysia. The SAC had given its approval of the same as seen in *CIMB Islamic Bank Berhad v. LCL Corporation Berhad & Anor* [2011] 7 CLJ 594).

[27] We noted that learned counsel for the appellant had earlier referred to the learned trial judge the SAC's ruling on *bai'al-inah* transaction. According to the SAC under the *bai' al-inah* transaction the same assets can be sold and purchased pursuant to an Islamic banking facility multiple times without affecting Syariah. The learned judge, however, had stated in her judgment that "further as I had shown above the contract involving the MOD facility, which the parties termed as *murabahah* was contrary to the basic tenets of financing based on *murabahah* as there were no fresh ASA and APA having been executed." This ruling by the learned judge ran contrary to that ruling of the SAC. We agreed with learned appellant's counsel that the learned judge had erred in not adhering to that ruling and not giving her reason for doing so. Thus we find the learned judge had erred firstly, by saying that the transaction of the MOD facility was null and void premised on the sale and purchase of the same asset.

Illegality

[28] The purported non-compliance with the *murahabah* principles does not in our view, render the contract illegal and unenforceable. The learned judge had wrongly construed the principles of illegality of contract in her judgment. We are mindful that, in the earlier case on *Islamic Banking, Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625; [2003] 2 AMR 177 the legal position was clearly stated by Abdul Hamid Mohamad JCA that even though the facility was an Islamic banking facility, it does not mean that the applicable laws are not the same laws. In this regard, the real issue confronting the court was whether a contract which did not comply with Syariah on one hand, but in compliance with the law of contracts on the other hand, would be legally enforceable. Before we proceeded to resolve this dichotomy, we remained unclear in the first place as to whether or not an agreement which does comply with certain requirement of Syariah as found by the learned judge in this case, would render the agreement unlawful and enforceable from the Syariah perspective itself.

[29] Having said that, we would begin our discussions on the issue of illegality by looking at s. 24 of the Contracts Act 1950. The section lists out five instances where a contract may be void or unlawful. All the five instances hinge on whether the considerations or objects of the contract in question is lawful or otherwise. A contract is said to be void or unlawful if the consideration or object of the contract is forbidden by law. It is also unlawful if it is of such a nature that, if permitted, it would defeat any law. Another instance is where the contract is a fraudulent contract ie, the contract entered into or designed to defraud a person. Yet another instance is where the contract involves or implies injury to the person or property of another. A contract could also be void or unlawful if the court regards it as immoral, or as against public policy. We did not find any of the aforementioned circumstances been cited by the respondents to contend a case of illegality. In other words, s. 24 of the Contracts Act 1950 does not come into play at all. The sole ground for holding that the agreement of MOD facility a nullity was purely from failure to comply with Syariah principles that govern the same.

[30] The English court had also applied English laws to enforce a *murabahah* contract. In *Islamic Investment Company of the Gulf (Bahamas) Ltd v. Symphony Gems NV & Others* [2002] All ER (D) 171 after hearing evidence from Syariah scholars on the principles of Syariah concerning the nature of a *Murahabah* agreement, the court found that the agreement in dispute did not satisfy the essential requirements of *murabahah*, yet found the English law applies and had given effect to the contract based on English law. Similarly, in the case of *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd and Others* [2004] 4 All ER 1072, the principles of Syariah in the English case was inserted by virtues of the governing law clause under the agreement. The governing law clause was stated as 'subject to the principles of Glorious Syariah, this agreement shall be governed by and construed in accordance with the laws of England.' We agreed with that approach and in our view, the validity of the contract in this case should be viewed from the law that generally governs the contract between parties in this country. This approach would be in consonant with what was stated in the case of *Bank Rakyat v. Emcee (supra).* We are therefore of the view firstly, the provisions of the Contracts Act 1950 still govern Islamic contracts. It follows, therefore, the MOD facility agreements are not one that can be avoided under s. 24 of the Contracts Act nor an illegal contract under s. 25 and therefore remains an enforceable agreement and must be adhered to.

[31] Relating to the issue of quantum, is whether the appellant had correctly imposed *ta'widh* or penalty on the respondents. The learned judge held that the first respondent had not committed any default to allow the appellant to charge *ta'widh* against them. Furthermore, the appellant had not furnished the statement of account to the respondents prior to the filing of

the case in court. The statement of account relied on by the appellant was prepared after the consent order was entered. It was not, according to the learned judge, a contemporaneous document. Her Ladyship found that the appellant had not produced documents which formed the basis of the calculations to substantiate its claim against the respondents in respect of *ta'widh*. Her Ladyship found the appellant to have merely relied on the summary of *ta'widh*'s calculation without producing or showing the calculation, of how the figure of RM2,000,000 was arrived at. Hence the learned judge found the claim on *ta'widh* unsubstantiated.

[32] Under the terms of the second LO, the MOD facility had to be paid up fully on 5 May 2006. Under cl. 15 of the first LO and cl. 2.10 of the master facility agreement, cl. 8 of the second LO as well as cl. 2.10 of the facility agreement the appellant had reserved the right to claim for penalty or *ta'widh* in the event of default. There was also the guidelines of Bank Negara Malaysia that allows Islamic banks to claim for compensation, and how to compute the same.

[33] We agreed with the appellant that the MOD facility was correctly terminated because the respondents did not adhere to the terms that it should be fully paid by the respondents on 5 May 2006, as there was no new APA and ASA executed. In the circumstances, the appellant should be allowed to exercise its rights as conferred under all the relevant LOs and security documents to charge *ta'widh.* It has also been agreed between the parties under cl. 15 of the first LO, cl. 2.10 of the master facility agreement and cl. 8 of the second LO and cl. 2.10 of the facility agreement dated 23 December 2004 that the appellant has the rights to claim for penalty (*ta'widh*) in the event of default by the respondents or upon maturity.

[34] The guidelines of Bank Negara Malaysia dated 10 December 1998 (referred to by the appellant's counsel in his written submission) allows Islamic Financial Institutions to charge a penalty on defaulters. The penalty allowed was at market rate known as "R" rate on the outstanding principal, though the penalty imposed cannot be compounded. Later in 2012, effective from 1 July 2012, through another guidelines – "BNM/RH/GL/008-14-Islamic Banking and Takaful Department & Consumer and Market Conduct Department – Guidelines on Late Payment Charges for Islamic Banking Institution" Islamic banks are allowed to be compensated for the amount of actual loss incurred as a direct result of the delay in repayment or default by the customer subject to any *ibra*' (rebate) if applicable. The actual loss to be compensated from default payment exceeding the maturity date shall not be more than the prevailing daily overnight Islamic Interbank Money Market rate (the IIMM rate), on the outstanding balance of the Islamic financial product. The guidelines also stipulate that the reference rate for the actual

loss shall be determined at the point of default, computed on a monthly basis from the payment due date. The guidelines also impose the limit of the compensation that can be charged to the customer.

[35] It was argued by the respondents that the appellant had charged *ta'widh* retrospectively and the calculation was not substantiated. Furthermore, the respondents contended the bank officer who calculated the Ta'widh chargeable was not called to give evidence and to show that the amount of *ta'widh* claimed was correct. Learned counsel cited *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627 and *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229 to support his contention. Learned counsel for the respondents in his written submission dated 12 May 2015 submitted at length on the issue that the calculation of *ta'widh* in this case is erroneous.

[36] It became apparent from the guidelines that not only Islamic banks can be compensated for actual loss due to default of payment by customers, but it has also provided for the method of computation and the determination of reference rate for the purpose of computation in line the guidelines. The respondents in alleging that the computation by the appellant was erroneous have failed to show that the appellant had not adhered to the guidelines issued by the Bank Negara as referred to above.

[37] We further agreed with counsel for the appellant that the statement of account at pp. 1051 to 1055 of the appeal record vol. 5 should be admitted and considered by the learned judge. The learned judge had erred in rejecting it. The statement of account has satisfied s. 73A(1) of the Evidence Act 1950 as the maker of the statement of account PW1 was called to testify. PW1 was the maker who has signed the statement of account.

[38] In our view, the terms of the agreements and the guidelines, entitled the appellant to claim for compensation and *ta'widh* for default in payment on the facility by the first respondent. The guidelines had laid down the manner of computation of the compensation and the *ta'widh*. The appellant had shown to the court its statement of account which detailed the calculation. The respondents had not seriously challenged the method of the calculation by the appellant or had failed to show how the appellant's calculation was wrong. Thus the calculation by the appellant should be had been accepted, by the learned judge.

[39] We then proceeded to deliberate on issue of limitation. With regards to limitation, we agreed with the appellant that the learned trial judge had misconstrued the facts in concluding that limitation had set in. We noted that the second APA and ASA were executed pursuant to the terms of the second LO. The appellant admitted that the MOD facility secured by this second APA and ASA had matured on 5 May 2006. The learned judge had taken this date as the date when the cause of action had first arisen. However, Her

Ladyship had failed to consider that the MOD facility was restructured *vide* the third LO dated 28 May 2009, whereby the appellant had also requested the first respondent to execute a fresh APA and ASA in order to comply with the *murahabah* concept.

[40] The refusal by the first respondent to execute a new APA and ASA was an act of breach of obligations under the contract and an event of default then triggered. The appellant had repeatedly requested the first respondent to execute APA and ASA as seen from the appellant's letters of 12 June 2009, 30 June 2009 and 21 July 2009. The letter of demand for payment of the outstanding amount due under the facility was issued only on 11 March 2013. Thus the earliest date the cause of action could have arisen was on 21 July 2009. The suit was filed on 25 April 2013 and was well within the time permitted under the law.

[41] The learned trial judge had erred in her finding that the appellant was caught by limitation and there was delay in making the claim. Furthermore, from the pleadings, we noted that limitation was not even a pleaded case of the respondents.

Consent Order

[42] It is pertinent to note that while the appellant and the first respondent were in discussions regarding the restructuring and the terms of the restructured MOD facility, the first respondent had commenced an earlier Suit No. 22M-2-03-2013 against the appellant as well Malayan Banking Berhad, which led to the consent order dated 27 March 2013. Under that consent order, the first respondent had admitted its liability to pay the appellant under the MOD facility except that the amount outstanding was still an issue.

[43] In our view, the consent order dated 27 March 2013 stands as a valid order until set aside. This is trite law. Therefore, the learned judge erred when she disregarded the consent order and refused to judicially consider the liability of the first respondent on the strength of that consent order.

[44] It was the finding of the learned High Court Judge that the consent order recorded under the Suit No: 22M-2-03-2013 before Her Ladyship earlier did not bind the court and should not be taken as an admission of liability by the first respondent on the MOD facility. To be noted, the consent order which relates to the MOD facility is as set out as below:

> 1. Bahawa pihak M-10 Builders Sdn. Bhd. mengakui liabilitinya untuk membayar Maybank Islamic Berhad di bawah Kemudahan Murabahah Overdraft (MOD) dengan nombor akaun 564258-314397 tetapi mempertikaikan jumlah yang perlu dibayar dan tarikh pembayaran sepatutnya di bawah Kemudahan MOD tersebut. Jumlah yang perlu dibayar dan tarikh pembayarannya serta tuntutan balas M-10 Builders

A Sdn. Bhd. harus didengar dan diputuskan oleh Mahkamah di suatu tindakan Writ yang akan difailkan oleh Maybank Islamic Berhad atau M-10 Builders Sdn. Bhd., kelak.

2. Bahawa tindakan di atas ditarik balik oleh Plaintif dan dibatalkan dengan kebebasan untuk difailkan semula tanpa apa-apa Perintah ke atas kos.

B

[45] A consent order is like a judgment of the court and would remain valid until it is set aside (see *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343; [1991] 1 MLJ 100). It is plain and obvious that from the above clause of the consent order, the first C respondent had admitted liability to the appellant on the MOD facility. Plainly, the respondent would be estopped from raising any further issue on MOD facility except on the quantum *per se* as reflected in the consent order. Even on this ground alone, the liability of the first respondent is founded.

Cross-Claim

D

[46] We now come to the counterclaim of the respondents. The learned judge had dismissed the counterclaim of the respondents on their failure to establish the same. The pleaded case was principally based on the argument that the appellant had no rights to vary the terms of contract unilaterally and that the unilateral reduction of the MOD facility limits unconscionable and E against the Islamic principle. We have perused through the agreements entered between parties. Under the agreements herein, as in conventional contract, all terms must be agreed between the parties. The first respondent had agreed that the appellant would have absolute discretion to review and vary the terms of the facility granted to the first respondent. Furthermore, F the review of the facilities and the variation of the terms was communicated by a fresh letter of offer. The first respondent was at liberty either to agree to the revised terms, or to reject them, as has been done in relation to the third LO.

[47] Consequent to our findings that the MOD facility was correctly G terminated, we agreed with the learned High Court Judge that the counterclaim was wholly unsubstantiated.

[48] For the reasons stated above, we allowed the appeal and dismissed the cross-appeal with a global cost of RM100,000 here and below to the appellant. We ordered for post judgment interest of 5% be allowed pursuant H to O. 42 r. 12A of the Rules of Court 2012 from 3 September 2014 until full realisation of the payment.

We hereby order so.

I

Hamid Sultan Abu Backer JCA (concurring):

[49] The appellant/plaintiff (bank) appeal is against the decision of the learned High Court Judge who refused to enter judgment for breach of Islamic finance facility granted to the first defendant. The second defendant is the guarantor. The defendants' counterclaim was also dismissed. We heard the appeal on 19 May 2015 and allowed the plaintiff's claim and dismissed the cross-appeal by the defendants. My learned sister Rohana binti Yusuf JCA has written a judgment allowing the plaintiff's claim and dismissing the cross-appeal. This is my supporting judgment.

[50] The prayer in the statement of claim reads as follows:

(i) The outstanding amount of RM4,599,016.37 as at 28.02.2013;

(ii) Late payment charge by way of *ta'widh* at the prevailing daily overnight Islamic Interbank Money Market rate on the amount of RM3,857,201.38 from 01.03.2013 until the date of full settlement;

(iii) Costs; and

(iv) Any other relief as this Honourable Court deems just and fit to grant.

[51] The prayers in the counterclaim read as follows:

49. Wherefore the Defendants claim:-

a. A declaration that the Letter of Offer dated 8.12.2004 is a continuation to the Letter of Offer dated 31.7.2003 and both should be read together;

b. A declaration that the *murabahah* Overdraft Account at the sum of RM2,900,000.00 under the Loan Facility Agreement which was signed on 31.7.2003 will mature and/or cancelled 10 years from the date of the 1st Drawdown;

c. A declaration that the 1st Drawdown under the *Murabahah* Overdraft Account was on the 17.2.2004 and thereafter the *Murabahah* Overdraft Account will only mature and/or cancelled only on 16.2.2014;

d. A declaration that the Plaintiff is only entitled to claim the *Murabahah* Overdraft Account if any after 16.2.2014 and or any time that this Honourable Court deems fit and just in considering and taking into account the *Murabahah* Overdraft Account which has been suspended since 2009;

e. Consequentially, a declaration that *Ta'widh* on the *Murabahah* Overdraft Account (MOD) should only be imposed on any of the overdue amount after 16.2.2014 or maturity date of the *Murabahah* Overdraft Account (MOD) after taking into account the suspension of the said Account since 2009;

A

f. A declaration that the unilateral reduction of Islamic banking facilities and the suspension of the said Account since 2009 by the Plaintiff and/or Malayan Banking Berhad are against the principles of Islamic Banking and Syariah Principles (Rukun Syariah);

B

g. An Order for the Plaintiff to pay to the Defendants a total sum of RM 12 million namely RM 3.0 million a year from 2009 or any amount this Honourable Court deems fit and just for the returns towards the mortgaged assets which has been denied to the Defendants;

C

h. An Order for the Plaintiff to pay the Defendants for all the losses and damages suffered by the Defendants in year 2010 and 2012 as a result of the Plaintiff's action in unilaterally reducing the *Murabahah* Overdraft facilities and the Plaintiff's refusal to give any other form of loan facility although holding real estate mortgage where the value was much higher than the loan rate;

D

i. An Order for general damages (to be assessed) to be paid by the Plaintiff to the Defendants for the Plaintiff's action in unilaterally reducing the banking facility. Wherefore, the Defendant pray for compensation at the rate "r"-Islamic Investment Returns on the general damages to be assessed from the date of judgment up to the date of full settlement of the said total sum of general damages;

E

j. Exemplary Damages;

k. Costs;

l. Other reliefs that the court think suitable and fit.

[52] The memorandum of appeal of the plaintiff reads as follows:

F

1. the learned High Court judge had erred in dismissing the Appellant's claim against the Respondents for the amount of RM4,599,016.37 as at 28.02.2013 in respect of the *Murabahah* Overdraft Facility and the Late Payment Charge by way of *Ta'widh* at the prevailing daily overnight Islamic Interbank Money Market rate on the amount of RM3,857,201.38 from 01.03.2013 until the date of full settlement.

G

2. the learned High Court judge was correct in dismissing the Respondent's counterclaim with no order as to costs on 03.09.2014.

3. the learned High Court judge had erred and misled on points of law and facts in deciding that the *Murabahah* Overdraft Facility granted by the Appellant to the 1st Respondent was unlawful and not in compliance with the provisions of Islamic banking under the guidelines issued by Bank Negara Malaysia.

H

4. the learned High Court judge had erred and misled on points of law and facts in ruling that the Appellant had no right and no basis to charge *Ta'widh* after maturity of the *Murabahah* Overdraft Facility which were not extended.

I

5. the learned High Court judge had erred and misled on points of law and facts in deciding that the Consent Order dated 27.03.2013 recorded under the Suit No: 22M-2-03/2013 does not bind the Court and should not be taken as an admission of liability by the 1st Defendant against the Appellant on the *Murabahah* Overdraft Facility.

6. the learned High Court judge had erred and misled on points of law and facts in failing to take into consideration that the Consent Order dated 27.03.2013 was recorded before the same High Court judge and it was an agreement that has been recorded in the High Court.

7. the learned High Court judge had erred and misled on points of law and facts in deciding that the same asset cannot be used as an underlying asset for the *Murabahah* Overdraft Facility and other facility known as BBA Term Financing.

8. the learned High Court judge had erred and misled on points of law and facts in deciding that although her ladyship had decided that the *Murabahah* Overdraft Facility was void, there was no necessity for the High Court to grant an order for restitution under Section 24 and 66 of the Contracts Act 1950.

9. the learned High Court judge had erred and misled on points of law and facts in referring and decided that the Bank Negara Malaysia Guidelines title "2013 *Murabahah* Guidelines" with reference BNM/RH/STD 028-4 and also a publication by Bank Negara Malaysia title "The Principles and Practices of Shariah in Islamic Finance - Shariah parameter Reference 1- *Murabahah* year 2009" were applicable in this case.

10. the learned High Court judge had erred and misled on points of law and facts in deciding that the principle of *Bai Al-Inah* and resolution and guidelines of the Bank Negara Malaysia and/or BNM Shariah Advisory Council of the *Bai Al-Inah* concept were not applicable in the *Murabahah* Overdraft Facility.

11. the learned High Court judge should have decided that the Appellant was entitled to record a judgment on the amount claimed in the suit together with *Ta'widh* and costs.

12. the learned High Court judge should have decided that the *Murabahah* Overdraft Facility granted by the Appellant to the 1st Respondent was valid and did not violate the provisions of Islamic banking under the guidelines issued by Bank Negara Malaysia.

13. the learned High Court judge should have decided that the Appellant has the right and basis in claiming for *Ta'widh* after the *Murabahah* Overdraft Facility had matured and was not extended.

14. the learned High Court judge should have taken into account that, based on the Appellant's account there was no profit charge against the amount utilised by the 1st Respondent after the maturity of the *Murabahah* Overdraft Facility.

    Therefore, the Appellant is entitled to charge *Ta'widh* at the rate permitted by the Shariah Advisory Council of Bank Negara Malaysia from the maturity date until full settlement of the Facility.

15. the learned High Court judge should have decided that the Consent Order dated 27.03.2013 is binding on the Court and should be considered as an admission of liability by the 1st Respondent towards the Appellant in respect of the *Murabahah* Overdraft Facility.

16. the learned High Court judge should have decided that, with the admission of liability, what needs to be assessed is the amount payable by the Respondents to the Plaintiff and the issue of liability should no longer be an issue to be tried.

17. the learned High Court judge should have decided that the Respondents are estopped from raising the issue of liability due to the admission of the liability.

18. the learned High Court judge should have decided that the same asset can be used as an underlying asset for the *Murabahah* Overdraft Facility and other facility known as BBA Term Financing based on the Bank Negara Malaysia Guidelines and/or resolution by the Shariah Advisory Council of Bank Negara Malaysia in regards to the sale and purchase of underlying asset under Shariah concept of *Bai Al-Inah*.

19. alternatively, the learned High Court judge should have decided that even if the *Murabahah* Overdraft Facility is void, the High Court should have granted an order for restitution pursuant to Section 24 and 66 of the Contracts Act 1950.

20. the learned High Court judge should have decided that the Bank Negara Malaysia Guidelines title "2013 *Murabahah* Guidelines" with reference BNM/RH/STD 028-4 and also a publication by Bank Negara Malaysia title "The Principles and Practices of Shariah in Islamic Finance - Shariah parameter Reference 1- *Murabahah* year 2009" were not applicable in this case.

21. the learned High Court judge should have decided that despite the name "Murabahah" was used in all documents and Letters of Offer between the Appellant and the 1st Respondent , the actual fact is that the *Murabahah* Overdraft Facility is based on the concept of Shariah *Bai-Al Inah*.

22. the learned High Court judge should have decided that the principle of *Bai Al-Inah* and the resolutions as well as the guidelines of the Bank Negara Malaysia and/or the Shariah Advisory Council of Bank Negara Malaysia in regards to the concept of *Bai Al-Inah* is applicable towards the *Murabahah* Overdraft Facility.

23. the learned High Court judge should have referred to the Shariah Advisory Council of Bank Negara Malaysia under Section 56 of the Central Bank of Malaysia Act 2009 on any Shariah's issue rather than making decisions based on irrelevant BNM Guidelines.

24. the High Court should have allowed the Appellant's claim with costs and therefore, the Appellant pray for this appeal to be allowed with costs.

25. as this memorandum is prepared before the receipt of the Grounds of Judgment of the High Court, the Appellant reserves its right to amend the Memorandum of Appeal after the Grounds of Judgment is received.

[53] The supplemental memorandum of appeal reads as follows:

(1) The learned High Court judge had erred and misled on points of law and facts in deciding that the Appellant was caught by limitation period and delay. The High Court should have decided that the issue of limitation does not apply in this case because the Respondent was still continuously utilising the facility provided after 05.06.2006. Moreover there was some part payment made by the 1st Respondent and furthermore, termination of the Facility was only made *vide* Letter of Demand and Termination dated 11.03.2013. Thus, the Court should have decided that the cause of action arises only after the Respondents failed to comply with the Notice of Demand.

(2) The learned High Court judge had erred and misled on points of law and facts in deciding that the Appellant had failed to prove its case and the amount claimed.

(3) The learned High Court judge should have decided that the Plaintiff had proved its case through documents and witnesses that were presented during the Full Trial.

(4) The learned High Court judge should have decided that the amount of claim has been proven through the Appellant's statement of account and PW-1 was one of the maker of the statement of account.

(5) The learned High Court judge should have taken into account the fact that the Respondents had failed to accept and execute all documents for the new facility *vide* letters of offer dated 28.05.2009, 16.07.2009 and 07.09.2009. The High Court should also have also decided that the Appellant has the right to review the *Murabahah* Overdraft Facility and to fix the terms of the *Murabahah* Overdraft Facility.

[54] The notice of cross-appeal reads as follows:

1. The Judgment of the High Court dated 3.9.2014 ordering that the Counterclaim be dismissed with no Order as to costs ought to be reversed; and

A The grounds for the cross appeal are as follows:

2. The learned Judge failed to appreciate the following undisputed facts, *inter alia*:

a. The total Facility granted by the Appellant/Maybank was a long-term loan (10 years) for an amount of RM14,000,000.00 B inclusive of the MOD.

b. The Appellant/Maybank had on or about 28.5.2008 unilaterally reduced the facility by RM8,400,000.00 to merely RM5,470,544.30; DESPITE:

C i. The Respondent never having requested for the said reduction.

ii. The Respondent servicing the facilities satisfactorily;

iii. No notices of purported default were ever given to the Respondent; and

D iv. Holding on to Assets of the 1st Respondent worth well over RM18,000,000.00 together with floating charges.

3. In that regard and flowing from the above facts, the Learned Judge erred in law for failing to hold that the above unilateral reduction is unlawful, against the principle of equity and good conscience, and E against the Shariah Principles.

4. The learned Judge erred in fact and law by failing to hold that the Appellant/Maybank's unilateral reduction of the banking facility, which primarily based on policy consideration without any regard for the harm caused to the Respondent is inequitable and against F Islamic/shariah principles.

5. The Learned Judge failed to appreciate the following facts:

a. That the unilateral reduction has caused irreparable damage and disabled the Respondent to participate in the tendering process.

G b. The tendering process needs tender bond requirement of 1% of the tender value. By removing the IBG of RM2,000,000.00 the Appellant/Maybank has effectively removed RM200,000,000.00 tendering capacity of the Respondent.

c. The admission by the Appellant/Maybank in respect of the grave consequences in tendering process, which may befall a H company if the IBG is reduced and/or terminated.

d. The Appellant/Maybank's actions, which had constrained the Respondents tender applications after 2010.

e. The Respondents estimated potential loss to be in the region of RM200,000,000 worth of projects and/or tenders and I

f. Appellant/Maybank did not contradict the above figure in respect of the potential losses as mentioned above.

6. In that regard and flowing from the above facts, the Learned Judge erred in law when her Ladyship failed to:

   a. Hold that the Respondents did indeed suffer losses and/or damages as a consequence of the unilateral reduction of the banking facilities; and

   b. Award appropriate damages to the Respondents and/or allow for the same to be taxed.

7. The Learned Judge erred in law in failing to hold that the conduct and actions of Appellant/Maybank in unilaterally reducing the facility is also not condoned by the Equitable Principles from the Holy Quran.

General Jurisprudence Relating To Enforcement Of Islamic Banking Contracts In Malaysia

[55] It is trite that the Syariah jurisprudence does not recognise banking concepts as practised by conventional banks. In Malaysia, Islamic trading concepts have been used as financing instruments to provide Islamic banking facilities. The providers of these facilities generally are conventional bankers who are licensed to operate Islamic trading facilities under the label of Islamic banking. These conventional bankers or its shareholders need not necessarily be Muslims and/or those who subscribe to Islamic principles or values. They are just business entities who have ventured to use the Islamic label to make profits. They are not concerned with Syariah jurisprudence or its values in the conservative sense.

[56] Their customers often contract on the basis that the transaction is Syariah-based in the conservative sense; and when there is default in the facility, only then they are advised by the customer's lawyers that the facilities they have entered into are strictly not Syariah-based and the contractual terms are to their disadvantage when they end up paying more than what the conventional banks charge their customers in interest as well as penalties. In consequence of the advice, the customers make an attempt to challenge the facilities, either to escape liability as a whole or reduce the quantum of the claim.

[57] The apex courts' decision and/or its policy which can be gleaned from case laws is to ensure that the Syariah facilities are declared by the court as valid when it has gone through licensed banks and/or financiers where the Bank Negara (Central Bank) strictly monitors the Islamic finance facility and its terms with the assistance of Syariah Advisory Council. However, courts are generally sympathetic when the customer complains the quantum of claim is excessive and/or breach of contract and/or the discretion of the banks to charge damages and/or rebate has not been properly exercised. This distinction is an important one which must be kept in mind to appreciate the role of Malaysian courts in dealing with Syariah issues.

[58] I have captured the jurisprudence, problems, issues, etc. in a number of judgments and articles, etc. To name a few are as follows: (i) *Malayan Banking Bhd v. Ya'kup Oje & Anor* [2007] 5 CLJ 311; (ii) *Majlis Amanah Rakyat v. Bass Lai* [2009] 2 CLJ 433; (iii) *Yong Fuat Meng v. Chin Yoon Kew* [2008] 5 CLJ 705. Two articles on the subject that were published are titled *'Is There a Need for Legislative Intervention to Strengthen Shariah Banking and Financial Instrument*' [2002] 3 MLJ clxx; and *'Critical Thoughts: Legislative Intervention Imperative To Support Islamic Financing On A Global Scale'* [2009] 1 MLJ 1xiv.

[59] In my recent paper on *"Islamic Banking Regulatory Authorities in Malaysia: Their Role and Power: A Critical View"* – delivered recently, (see [2015] 9 CLJ (i)), I have summarised the current state of affairs in relation to Islamic banking in Malaysia which is very relevant to the instant case as well as the decision.

[60] In essence, from all the literature available presently on Islamic banking in Malaysia, it will be nearly impossible to oppose liability and/or quantum when the bank initiates an action to recover the facility amount as per the contractual terms. (See *Bank Kerjasama Rakyat Malaysia Bhd v. Emcee Corporation Sdn Bhd* [2003] 1 CLJ 625; [2003] 2 AMR, 177; *Islamic Investment Company of the Gulf (Bahamas) Ltd v. Symphony Gems NV & Others* [2002] All ER (D) 171; *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd and Others* [2004] 4 All ER 1072). That is to say, the mode employed by the defendants to oppose at the recovery stage is often perceived not to be *bona fide* and common sense approach will dictate that the customer having received the benefit of the facility ought not in law or equity to escape liability. If courts were to declare such facilities which have the support of Bank Negara, the logical consequence will be that the banking industry will be affected and it may lead to the collapse of the economy.

[61] The court's decision would have been different if the customer after having entered into an Islamic facility agreement on the representation of the bank that it is Syariah-compliant, subsequently realises that it is more of a 'riba' based transaction, files an application under the Specific Relief Act 1950 to set aside the facility agreement and also repay all the facility sum advanced by the bank. In such instance, it is likely that the court may set aside the facility agreement if it so warrants.

[62] There are so far no cases by the apex court where a genuine customer has made an application to set aside the facility agreement with the readiness and ability to return all the facilities' sum received by the customer to the bank.

[63] The facts of the instant case is one where the defendants had voluntarily entered into the financial facilities agreement and continued the transaction for a number of years and have filed a defence and counterclaim to deprive the bank of its lawful dues. The defendants have not as an

alternative introduced evidence to dispute the quantum and/or proffered arguments to say that the bank had not properly exercised its discretion in claiming damages. (See *Malayan Banking Berhad v. Worthy Builders Sdn Bhd & Ors* [2015] 1 LNS 84; [2015] MLJU 45). If the defendants' pleaded case is bad in law, the court cannot assist in reducing the quantum, notwithstanding on the facts of the case, it is obvious that the excessive sum claimed in damages by the bank is not only unjust and inequitable but also unconscionable (as observed by the learned trial judge) for which the Bank Negara which is the regulatory body should investigate and arrest such conduct by the bankers with severe penalties and also must make sure that other banks do not abuse the process. The regulatory part of the work is placed on Bank Negara and other relevant authorities and it is not the courts' role, in consequence of various legislation in place, to protect customers from being abused by bankers, as well as when there is appropriate complaint mechanism to initiate investigation.

(See Islamic Financial Services Act 2013; Financial Services Act 2013).

Brief Facts

[64] The learned trial judge has written a 58-page commendable judgment all within the spirit and intent of Syariah jurisprudence. However, the judgment does not reflect apex courts' decision to uphold Syariah contracts. Further, in the instant case, the customer has not resorted promptly pursuant to Specific Relief Act 1950 to set aside the facility agreement.

[65] The learned trial judge has summarised the facts of the case in an articulate manner. Much judicial time will be saved by repeating it *verbatim*.

> 1. By its Writ and Statement of Claim dated 25th April 2013 ("SOC") the plaintiff claimed against the defendants the sum of RM4,599,016.37 as at 28th February 2013 pursuant to a *Murabahah* Overdraft Facility with Account Number 5642583143397 granted by the plaintiff to the 1st defendant which the 1st defendant had defaulted. The 2nd defendant named herein was being sued in his capacity as the guarantor to the 1st defendant. The plaintiff also claimed for Late Payment Charges by way of *Ta'widh* based on Interbank Islamic Money Market Rate on the principal sum of RM3,857,201.38 with effect from 1st March 2013 until realisation and costs.
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> 2. The defendants refuted the plaintiff's claim and in its Amended Defence and Counterclaim the defendants amongst others, pleaded that the facility granted to the 1st defendant was not Shariah compliance as there were no Asset Sale Agreement ("ASA") and Asset Purchase Agreement ("APA") having been executed by both parties after the year 2004. Further, the plaintiff had prematurely terminated the *Murabahah* Overdraft Facility with Account Number 5642583143397, which would only expire on 16th February 2014. In any event, the 1st defendant had at all times managed the accounts in accordance with the terms of the

A Facility granted to it. The claim for *Ta'widh* was misconceived, unreasonable and contrary to the principle of financing premised on Shariah. The plaintiff's action was barred by limitation and there was laches and/or acquiescence on the part of the plaintiff.

3. Besides that, the plaintiff had also unilaterally reduced the amount
B granted under the Facility and this had caused the 1st defendant to suffer loss and damages as it was not able to secure the Bank Guarantee and/ or Performance Bond for various of its projects and/or lost the project it could secure and/or the income it could obtain from these projects.

4. Therefore, the defendants counterclaimed from the plaintiff for all loss
C suffered as a result of the plaintiff's actions mentioned herein.

5. After a full trial with three (3) witnesses having testified for the plaintiff and two witnesses testified for the defendants, I found that the Plaintiff had failed to prove its claim on the balance of probabilities and dismissed the Plaintiff's claim. Likewise, I found the defendants too had failed to prove their case against the plaintiff on the balance of probabilities and
D dismissed the defendants' Counterclaim. I had also ordered that each party to bear its own costs.

[66] The issues to be tried are as follows:

(i) Based on the defendants' admission of liability on the Overdraft
E Murabahah Facility what is the amount outstanding under the said Murabahah Overdraft Facility?

(ii) Whether the Murabahah Overdraft Facility have matured and have to be settled despite the fact that there are no Asset Purchase Agreement and Asset Sales Agreement having been executed by the 1st defendant after the expiry of the Asset Purchase Agreement and
F Asset Sale Agreement dated 23rd December 2004?

(iii) Whether the Murababah Overdraft Facility will mature after 2014, ten years after the Letter of Offer dated 31st July 2013?

(iv) Whether the refusal of the 1st defendant to sign and accept the Letters of Offer dated 28th May 2009 and 16th July 2009
G respectively tantamount to beaches of the agreement relating to the Murabahah Overdraft Facility?

(v) Whether plaintiff is entitled to vary the terms of the Murabahah Overdraft Facility and/or to unilaterally terminate the said Facility?

H (vi) Whether there is an outstanding amount due to the plaintiff under the said Murabahah Overdraft Facility?

(vii) Whether the plaintiff is entitled to impose late payment charges in the form of *Ta'widh* on the outstanding Murabahah Overdraft Facility based on rate permitted by the Syariah Advisory Council of Bank Negara Malaysia at the "R" rate or at 1% per annum?

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(viii) Whether the rate of *Ta'widh* based on the "R" rate can be imposed on the outstanding Murabahah Overdraft Facility after the said Facility had matured?

(ix) Whether the plaintiff has the right to unilaterally determine, vary, increase and/or reduce the amount of the facilities granted to the 1st defendant in view of the fact the transactions involved were premised on the Islamic principle of financing?

(x) In view of the fact that the *Murabahah* Overdraft Facility had been suspended and/or stayed by the plaintiff in 2009, what is the effect of this suspension in relation the date of the maturity of the *Murabahah* Overdraft Facility?

(xi) Whether the 1st defendant suffered loss and damages as a result of the plaintiff's action to unilaterally reduce the *Murabahah* Overdraft Facility?

[67] The learned trial judge observation reads as follows:

104. It was the contention of the plaintiff that the tenure of the MOD Facility was for a period of twelve months subject to a yearly review and to be fully settled from the date of the 1st drawdown. On the totality of the evidence before me I found that despite the 1st and 2nd ASA and APA dated 15th December 2003 and 23rd December 2004 respectively having been executed, there were no fresh ASAs and APAs being executed after the lapsed of the 2nd ASA and APA on 22nd December 2005. Notwithstanding that, the plaintiff had allowed the 1st defendant to utilise the MOD Facility beyond the period of the expiry of the 2nd ASA and APA. This could be seen in B-3 at pages 522 to 527 of B3 where the details of these transactions were reflected.

105. The MOD Facility granted to the 1st defendant was reviewed pursuant to letter dated 28th May 2009 (see pages 398 to 400 of B2). This was rejected by the 1 defendant as evidenced by a series of letters issued by the 1st defendant (see pages 402 to 403, 407, 411 to 412, 424 to 425 and 443 to 444 of B2). The dispute pertaining to the reduction on the MOD Facility where the total amount granted under the 2nd LO was unilaterally reduced by the plaintiff as discussed in the preceding paragraphs. The dispute pertaining to the reduction of the restructured MOD Facility under the 2nd LO led to the filing of this case in Court.

106. It was apparent from the evidence both testimonial and documentaries, both the contracting parties ignored the features of financing premised on the Islamic Concept termed as *Murabahah* and blatantly regarded the transaction as if it was a conventional loan. By their conduct, both parties were privy to the illegality and had camouflaged the MOD Facility as *Murabahah* and both had benefited from this illegality. Obviously, this transaction had clearly violated the basic tenets of the financing premised on the Islamic

A Concept. Further as I had shown above the contract involving the MOD Facility, which the parties termed as *Murabahah* was contrary to the basic tenets of financing based on *Murabahah* as there were no fresh ASA and APA having been executed. In view of this and as both parties were privy to the illegality as illustrated above both parties had not come to this Court with clean hands. The Court
B therefore would not assist the parties who had come to Court to seek relief, if they had not come with clean hands.

107. In view of the above findings and bearing in mind, the principles illustrated under the heading "Burden of Proof neither the plaintiff nor the defendants had satisfied the test of proving each party's
C case on the balance of probabilities.

[68] I have read the appeal records and the able submission of the parties. After giving much consideration to the submission of the defendants, I take the view that the appeal ought to be allowed and the cross-appeal be dismissed. My reasons, *inter alia,* are as follows:

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(i) in view of the various apex courts' decision on the issues raised by the defendants, it will be sheer waste of judicial time to address the defendants' grievance as per the statement of defence and counterclaim when it impinges on the *bona fide* issue as to the defence for reasons I have stated earlier. In consequence, I will rule that the defence and
E counterclaim taken in its totality are bad in law;

(ii) the defendants in this case have also not led evidence to show that the quantum of claim should be reduced. In consequence, this court by the strict pleadings rules will be in no position to assist the defendants;

F (iii) on the issue of limitation, the factual matrix of the case will show that it is a running account with acknowledgment of liability and obligation and it is not a case of a sterile account or claim where the defence of limitation can be said to have kicked in. In consequence, I take the view that the defence of limitation has no merits.

G (iv) on the issue of liability, I take the view that the learned trial judge's assessment of the Syariah principles without first referring to the 'Syariah Advisory Council' as required by relevant legislation impinges on the decision of the learned trial judge. In addition, the documents and evidence submitted by the plaintiff sufficiently prove a *prima facie* case
H against the defendants both on liability and quantum and has not been rebutted according to law.

(v) on the issue of '*ta'widh*', it is without doubt on the facts of the case as adumbrated by the trial judge seeking damages in the sum of about RM2 million, etc. is not only unjust and inequitable but oppressive and
I it is a matter for the regulatory authority like Bank Negara, etc. to investigate such abuse taking into consideration: (i) Syariah banking

facility was said to be allowed and to be operated to assist Muslims in their financial transaction within the Syariah parameters; (ii) the terms and conditions and the final settlement sum should not depart from the present market condition the general public is enjoying; (iii) Syariah label should not be used to abuse customers; (iv) Licensing to operate Syariah banking was made to cater for Muslims and not to detract from Islamic principles and values; (v) *'ta'widh'* on the facts stands as a disguised formula to secure interest in the name of damages and also does not appear in this case to be simple interest though compound interest is illegal under Syariah jurisprudence though simple interest with a different label is said to be permissible by a group of minority jurists. It is difficult at the appellate stage on the facts of this case to consider any issue as to illegality by the courts own motion. (See *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212).

(vi) Notwithstanding my observation on the '*ta'widh*' issue above, because of the pleaded case of the defendants and the supporting evidence which I have stated earlier was not well articulated, the appellate court based on the pleadings rules will not be able to reduce the quantum claimed and/or order proper assessment of damages, etc. If the case for the defendants had been properly pleaded, some concession could have been made based on established principles. (See *K. Umarkandha Rajah v. EL Magness* [1984] 2 CLJ 23; [1984] 1 CLJ (Rep) 416; [1985] 1 MLJ 116).

[69] It is now in the hands of the Bank Negara and/or relevant authority to investigate the appellant's conduct in the transaction if they deem fit.

[70] For reasons stated above, I will allow the appeal and dismiss the cross-appeal with the global costs of RM100,000 to the appellant for here and below. Deposit to be refunded. Post-judgment interest of 5% is allowed pursuant to O. 42 r. 12A of the Rules of Court 2012 from 3 September 2014 until full realisation of the payment.